

ESTATE OF FRANCES INGEBORG CONGER (FORD)

IBIA 85-2

Decided October 16, 1985

Appeal from an order denying rehearing issued by Administrative Law Judge S.N. Willett in Indian probate IP PH 1761 84 (REH), IP PH 273I 82.

Vacated and remanded.

1. Indian Probate: Inheriting: Generally

In accordance with the Federal trust responsibility and the inherent authority of the Secretary to correct a manifest injustice, 43 CFR 4.320, the Board orders partial distribution of an Indian decedent's trust estate to those heirs that can be determined and retention of the remaining portion of the estate in trust status until such time as the heir or heirs to that portion can be determined.

APPEARANCES: Harold E. Campbell, Esq., and Eric Dahlstrom, Esq., Scottsdale, Arizona, for appellant. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On October 4, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Lyllice Ford (Guerrero) (appellant). Appellant sought review of an August 8, 1984, order denying rehearing issued by Administrative Law Judge S.N. Willett in the estate of Frances Ingeborg Conger (Ford)

(decedent). The denial of rehearing let stand a March 30, 1984, order of dismissal in this estate. For the reasons set forth below, the Board vacates those orders and remands this case with instructions to reinstate the probate.

### Background

Decedent, Pima/Papago SRID-8073, was born on October 4, 1943, and died intestate on January 29, 1981. A hearing to probate her Indian trust estate was held by Judge Willett on November 11, 1982. The hearing revealed that decedent had relationships with several men, none of whom she had legally married. These relationships resulted in the birth of six children, all of whom survived decedent: Rudy Almanza, a/k/a Rudy Conger; Elena Frances Almanza, a/k/a Elena Frances Conger; Guadalupe Almanza, a/k/a Gudalupe Conger; Theresa Conger Washington; Donald Francis Shelton; and Lyllice Frances Ford (appellant).

As a result of information provided at the hearing, investigations revealed that decedent married Anibal Pineiro, a Puerto Rican national, on September 2, 1958, in Chicago, Illinois. No family member had seen or heard from Pineiro, since 1959, and it was believed he had been deported. The Land Management Office of the Salt River Pima/Maricopa Indian Community (tribe) <sup>1/</sup> presented certain documents to the Board showing their unsucces-

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<sup>1/</sup> The tribe has a contract under the Indian Self-Determination and Education Assistance Act of Jan. 4, 1975, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. §§ 450-450n (1982), (P.L. 638) to perform certain realty-related functions otherwise performed by the Bureau of Indian Affairs (BIA). Those functions performed by the tribe include the preparation of the Departmental heirship data sheet for use by the Administrative Law Judge in probating the estates of deceased tribal members.

ful attempt to locate Pineiro through the Chicago branch of the Immigration and Naturalization Service, U.S. Department of Justice. These documents had not been presented to Judge Willett.

Appellant argued before Judge Willett that decedent's estate should be distributed to the heirs that could be determined and that Pineiro's interest either should be turned over to a conservator as provided for under Arizona state law, or should escheat to the tribe with the possibility that the escheated property would later be restored to Pineiro, should he appear. Judge Willett, however, dismissed the probate on March 30, 1984, stating at page 2 of her order:

Administrative Law Judges in Indian probate proceedings have no authority of the type suggested by petitioner. Under 25 U.S.C. Sections 372 and 373, as implemented by 43 C.F.R., Part 4, the Administrative Law Judge may dispose of an estate only when there is substantial evidence upon which to base the determination of heirs. Under the present circumstances, it is the lack of information about the decedent's spouse which prevents the entry of an order. There is no basis upon which the fact of a legal spouse and his potential rights may be ignored. There are, likewise, no procedures under 25 U.S.C. Sections 372 and 373 which permit the attribution of a specific share and retention of such share in an escrow account for the benefit of an individual whose rights cannot be ascertained.

Appellant petitioned for rehearing and offered to prove Pineiro should be presumed to be dead, and alternatively, that the portion of decedent's estate to which he was entitled should escheat to the tribe. Judge Willett denied rehearing on August 8, 1984, stating:

In any event, the Administrative Law Judge cannot do what the petitioner asks, specifically: to attribute a share to the

non-Indian spouse without regard to whether or not he may be predeceased or divorced from the decedent, then to extinguish that interest sua sponte and transfer the interest to the decedent's children. To do so at all would be an invalid act. But to do so on the basis of no information whatsoever about the spouse, would be an act of such patent irregularity that a decision so entered would be a nullity. The Administrative Law Judge is without the authority to create procedures and results other than those that are permitted and directed by appropriate law.

The petition also suggests that, here, we are merely dealing with the question of not knowing the whereabouts of the surviving spouse. In so stating, the petitioner mischaracterizes the issue and minimizes the magnitude of the problem. The outcome of the proceeding depends not merely upon the existence of a spouse, it further depends upon whether or not there was ever a divorce between the decedent and her spouse. If there was no divorce prior to the decedent's death, it must then be determined whether or not the surviving spouse is living or deceased and, if deceased, when he died.

The legally effective date for the transfer of estate property is the date of death. If the decedent's spouse died before the decedent or the relationship terminated by divorce prior to her death, there would be no right of inheritance. If death were to have occurred after the decedent's death, the party would be treated as subsequently-deceased and accordingly would hold a vested interest in the decedent's estate.

These questions cannot be ignored and assumptions may not be made one way or another on the basis of no evidence. The standard of proof applicable in Indian probate proceedings is a preponderance of the substantial evidence. An Administrative Law Judge cannot purport to decide a case on the merits in the absence of evidence on a material issue.

The second and alternative form of relief sought by the petitioner is the commencement of presumption of death proceedings. The Administrative Law Judge has on two occasions requested counsel for the petitioner to make an offer of proof in the matter. The second request set out specifically what must be provided in order to take action on the request. The petitioner had until July 9, 1984, to prepare a detailed offer of proof, with affidavits, to support the request to commence presumption of death proceedings. To date, the only information provided has been a general statement that family members and friends will testify that they have not seen the spouse for twenty-five years.

The latter, alone, is an insufficient basis upon which to presume an individual deceased. There must also be evidence, circumstantial or otherwise, from which it may be inferred that the subject person is, more probably than not, deceased.  
[Footnotes omitted.]

Appellant's appeal to the Board was received on October 4, 1984. Only appellant filed a brief.

### Discussion and Conclusions

On appeal, as before the Administrative Law Judge, appellant seeks a way to distribute decedent's estate to those heirs who can be determined. The dispute essentially centers on Departmental authority to allow partial distribution of an Indian decedent's trust estate when a potential heir or devisee cannot be located.

[1] Under 43 CFR 4.320, the Board "may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." The Board is also an agent of the trustee and, as such, is responsible for ensuring that the Federal trust responsibility to the Indian people is carried out. The Board holds that this is an appropriate case in which to exercise the inherent authority of the Secretary to prevent a manifest injustice to certain beneficiaries of the Federal trust relationship.

Accordingly, the Board remands this case to Judge Willett and orders the probate reinstated. Judge Willett should determine the shares of the estate to which appellant and her siblings are entitled and order distribution of those shares. Because there is insufficient evidence to determine whether Anibal Pineiro is entitled to a share in the estate, the share which would pass to Pineiro, if he were entitled to it, shall not be distributed, but shall remain in trust status and shall be administered by BIA as estate property for which the heirs have not been determined, in accordance with

25 CFR 162.2(a)(3), until such time as a determination of the heir or heirs can be made. 2/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 and 4.320, Judge Willett's August 8, 1984, order denying rehearing and the March 30, 1984, order dismissing probate are vacated, and this case is remanded to her for further action consistent with this opinion.

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Jerry Muskrat  
Administrative Judge

I concur:

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Bernard V. Parrette  
Chief Administrative Judge

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2/ The Board notes the tribe, which is responsible for providing information concerning Pineiro because of its P.L. 638 contract, may not have a sufficient interest in attempting to locate him. Under present law, failure to provide reliable information concerning this individual's whereabouts and the nature of his relationship to decedent at the time of her death will not result in benefits to the tribe, and may cause tribal members not to receive property to which they are entitled. Such failure should also be considered by BIA when it determines whether the tribe has satisfactorily carried out its contractual responsibilities.